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No. _____

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a federal court is precluded by the Eleventh Amendment to the United States Constitution from issuing an injunction which orders officials of the State of New Mexico to fund a program for the Navajo Nation in the minimum amount of $446,277 per year until the state can demonstrate that a lesser level of funding is justified based upon the Navajos' need for services.

LIST OF PARTIES

The parties to the proceedings below were the petitioners State of New Mexico and Juan R. Vigil, in his official capacity as Secretary of the New Mexico Human Services Department, and the respondents Navajo Nation, Linda Frank, Irene Benally, and the class of Navajo persons who reside on the Navajo reservation or on trust land within New Mexico.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners State of New Mexico and Juan R. Vigil, in his official capacity as Secretary of the New Mexico Human Services Department, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 22, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 975 F.2d 741 (10th Cir. 1992), and is reprinted in the appendix hereto. (App. 1.)

The Findings of Fact and Conclusions of Law of the United States District Court for New Mexico (Mechem, J.) has not been reported. It is reprinted in the appendix hereto. (App. 12.)

JURISDICTION

The jurisdiction of the United States District Court for the District of New Mexico was invoked pursuant to 28 U.S.C. §§ 1343 and 1362. (App. 12.) Subject matter jurisdiction was predicated on respondents' claims arising under 42 U.S.C. § 1983; 42 U.S.C. § 1988; 42 U.S.C. §§ 1397 to 1397(f); the Fourteenth Amendment to the United States Constitution; the Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3; and 32 U.S.C. § 7301. (App. 12-13.) The District Court entered a final judgment on July 16, 1991, in favor of respondents. (App. 25.)

On petitioners' appeal, the United States Court of Appeals for the Tenth Circuit, on September 22, 1992, entered a judgment affirming the judgment of the District Court. (App. 1.) No petition for rehearing was sought.

On December 10, 1992, Justice White ordered that the filing time for a writ of certiorari be extended to and including January 20, 1992.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I.

Facts.

Title XX of the Social Security Act, 42 U.S.C. §§ 1397-1397f (1981) (Title XX), provides funds for social services in each state in an amount proportionate to that

state's share of the total population of the United States. The State of New Mexico has received Title XX funds from the federal government since 1975. Pursuant to Title XX, the allocation of the funds is left to the discretion of each state.

For the fiscal years 1975 through 1987, the State of New Mexico awarded contracts for the expenditure of Title XX funds to the Navajo Nation for home care services on Navajo land. From 1988 to the present, the state awarded Title XX funds to the Navajo Nation through block grants.

For fiscal year 1984, the Navajo Nation was awarded $466,277 for its home care program. For the 1985 fiscal year, the state made a decision to fund twelve contractors state-wide for the provision of home care services. The money allotted to each contractor was designated to pay the salaries of and benefits for the homemakers who serviced the clients, and to pay administrative expenses incurred in performing the contracts. The state informed the Navajo Nation of the renewal of its Title XX contract and recommended an award of $446,277. (App. 7, 18.) However, before the state had finalized its funding decisions for the 1985 fiscal year, the New Mexico Human Services Department (Department) incurred an additional obligation requiring it to allocate $315,000 to fund Citizen Review Boards. This action was mandated by a November, 1984, stipulated court order in the case of *Wolfe v.*

State of New Mexico, No. 80-623 (D.N.M. filed Nov. 21, 1984). (App. 3-4, 19.)[1]

The need for Title XX services on Navajo lands and in the State of New Mexico has always exceeded the available funding for home care services and other Title XX funded services. From 1984 to the present, when determining the allocation of Title XX funds, both the State of New Mexico and the Navajo Nation have given top priority to the funding of protective services, such as child and adult protection programs designed to protect people who are at physical or emotional risk. Consequently, the Department concluded that the funding for the Citizen Review Boards required by the court order should come from the amounts budgeted for lower priority home care services. After reviewing the available options, petitioner Secretary Vigil decided to reduce the Navajo Nation's home care contract for 1985 to $278,000, thus making available the amount needed for the Citizen Review Boards. At the trial, Secretary Vigil testified that home care programs, other than the Navajo Nation program, could not remain viable if funding to those programs was reduced. It was his opinion that only the Navajo Nation program was of sufficient size to withstand a funding cut and remain viable.

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[1] The Citizen Review Boards were composed of groups of volunteers who were charged with the oversight of the cases of children placed in foster care or institutional care in order to expedite their final placement as efficiently as possible. (App. 3-4, 19.) The Department had first approached the New Mexico Legislature for the necessary funds on two occasions, but obtained only $127,000, thus leaving $188,000 to be reallocated from within its existing budget.

In 1986, the Department again allocated Title XX funds under the several social services contracts the Department administered. Although the amount of Title XX funds the state received from the federal government that year was increased by $925,500, the New Mexico Legislature appropriated fewer of the funds for contract services than in the previous year. As a result, the Department had only $6,110,668 available for contract services, a 19.2% reduction from the prior year. Because of the reduction in funds available for contract services, the Navajo Nation's contract was reduced by approximately one-half of one percent. The Department reduced the non-Navajo contracts to compensate for the remainder of the funding shortfall.

For the 1987 fiscal year, the state increased the funding of home care contracts. The amount allocated to the Navajo Nation home care contract was increased to $285,650.

From 1988 to the present, the state has utilized a block grant program in providing Title XX funds to the Navajo Nation. Under that program, the Navajo Nation receives a single grant, the funds of which may be spent on the delivery of services as the Nation deems advisable.

Nonetheless, the Navajo Nation did not receive any Title XX monies from New Mexico in 1988. The state and the Navajo Nation had reached an agreement on the terms of the contract and on a waiver of sovereign immunity, which was a condition to the Title XX contract. However, after the contract had been prepared, the Navajo Nation advised the Department that the contract had not been signed by the appropriate Navajo Nation governmental representative. At that point, insufficient time remained

in the fiscal year to make the execution of a contract practicable.

The Navajo Nation received $350,000 for each of the fiscal years 1989 and 1990 from the State of New Mexico under the block grant program. Since 1989, the Navajo Nation has used the majority of the grant for child protective services, rather than home care services.[2]

In addition to its receipt of funds under the block grant program, since 1990, the Navajo Nation has been entitled to compete with other social services providers in New Mexico for social service contract funding through the request for proposal process. However, the Navajo Nation did not submit a valid application for additional funding for the 1990 fiscal year.

II.

Proceedings Below.

On May 16, 1986, the Navajo Nation filed its initial complaint in the United States District Court for the District of New Mexico. The complaint alleged denial of equal protection, breach of contract, and deprivation of property without due process of law and sought declaratory and injunctive relief. After various procedural and dispositive issues were resolved,[3] the Navajo Nation filed

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[2] Prior to 1989, the Navajo Nation used its Title XX funds primarily for home care services.

[3] On March 30, 1987, the district court filed a memorandum opinion and order in which it granted respondents' motion to dismiss in part, concluding that while Title XX distributes funds

its second amended complaint for declaratory and injunctive relief and damages on June 7, 1990. The amended complaint alleged a continuing violation of the Navajos' right to equal protection of the laws from 1985 to the present with regard to the allocation of Title XX funds.

On July 16, 1991, the district court entered findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. (App. 12.) The court found in favor of respondents, concluding that petitioners' allocation of Title XX funds and services discriminated against Navajo Indians in violation of their constitutional rights to the equal protection of the laws.[4] Injunctive relief, attorney fees, and costs were also ordered. (App. 23-24.) As the court's judgment stands, the State of New Mexico is obligated to pay the Navajo Nation $446,277 every year from 1991 forward under the federal grant involved, unless a lesser need for services can be demonstrated.

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on the basis of population, it does not require the states to allocate those funds on a *pro rata* basis. In addition, because New Mexico law clearly establishes that there was no valid contract between the Navajo Nation or the other plaintiffs and the state, the district court dismissed respondents' procedural due process claim.

[4] Petitioners have never admitted and continue to deny that the decision in 1985 to cut the funding of the Navajo Nation Title XX program and the current funding of the program constitutes purposeful discrimination against Navajos. Petitioners believe that the lower courts misapplied the test for finding purposeful discrimination enunciated by this Court in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). However, the accuracy of the findings of the district court and the misapplication of the *Feeney* standard by the courts below will not be addressed further in this petition.

Three aspects of the findings of fact and conclusions of law of the district court require emphasis. First, the court found that "[a]fter 1980, the contracting process did not change from year-to-year except in the speed of its completion." (App. 16.) Second, the district court also found that funding decisions were made according to certain established criteria:

> [t]he [Department] review team considered the following aspects of each proposal from an existing contractor, including the Navajo Tribe [in making funding decisions]:
>
> 1. The community's feedback on the program.
>
> 2. The State's working relationship with the program.
>
> 3. The quality of the program.
>
> 4. Whether the program met clients' and community's needs.
>
> 5. Whether any problems existed or were foreseen in the program.
>
> 6. The program's strengths and shortcomings.
>
> 7. The number of clients served per month.
>
> 8. Any administrative or fiscal problems of the program including expenditure rate.

(App. 17-18.) Finally, however, despite the district court's finding concerning the criteria to be applied by petitioners in making funding decisions, the district court concluded that "[b]ecause the amount of funding is based

each year on the previous year's amount, the Tribe's present level of funding is the result of defendants' unconstitutional decision in 1985." (App. 22.)

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the district court. The court of appeals held that the Department's decision constituted purposeful discrimination against the Navajo Nation. The court did not decide "whether the decrease in state funding funneled through a race or nationality-based organization is facially discriminatory, however, because the district court's decision stands easily on its alternative disparate impact analysis." (App. 5.) In affirming the order of the district court, the court stated that "[a]bsent a showing that the Navajos' need for home care services has decreased, or that other legitimate factors make a decrease in the Navajo Nation's home care budget necessary, the state may not continue its disparately low funding based on the unconstitutional cut." (App. 11.) However, the court of appeals did not modify the district court's order, and therefore, the state must abide with the lower court's ruling.

REASONS FOR GRANTING THE WRIT

I.

Summary of the Argument.

This case presents a fundamental question concerning the limits of a federal court's power in granting prospective declaratory and injunctive relief to remedy a continuing violation of federal law. Simply put, the issue

is whether the district court can, as a portion of the relief granted, dictate that officials of the State of New Mexico fund a given program in the minimum amount of $446,277 per year until the state can demonstrate that a lesser amount is justified based upon the Navajos' diminished need for services and without taking into consideration any other factors. Or, does such an order transgress the boundaries of what is permissible pursuant to the dictates of *Ex parte Young*, 209 U.S. 123 (1908) and its progeny. Petitioners submit that it does.[5]

The Navajo Nation brought this lawsuit against the State of New Mexico and its officials, claiming that the Navajos' equal protection rights had been violated by a one-time reduction in funding of the Nation's contract with the state to provide Title XX services to its people. The district court found that their rights had been so violated and, as a portion of the relief conferred, ordered "that defendants are enjoined from failing to fund the Navajo Nation's Title XX contract services for the present and subsequent years at less than $446,277, unless a lower level of funding can be justified by the need for

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[5] The State of New Mexico was not dismissed as a defendant because of the district court's ruling that Eleventh Amendment immunity was waived, citing this Court's ruling in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976). However, in the interim, this Court has ruled to the contrary in *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991). Therefore, it is petitioners' position that the state is no longer a proper party. However, petitioners recognize that prospective injunctive relief can be awarded as against the Secretary in his official capacity pursuant to *Ex parte Young* and are contesting the nature of the relief granted pursuant to the facts in this case.

those services on the Navajo Reservation or in Navajo Indian Country." (App. 24.)

Title XX establishes a federal block grant program designed to provide financial assistance to states for the provision of social services, which includes adult and child protective services and home-based care for the elderly.[6] The need for Title XX services in New Mexico and on the Navajo reservation has always exceeded the amount of funding allotted to the state. Given the current socio-economic condition of the Navajos in New Mexico, the likelihood that the state will be able to demonstrate that the Navajos' need for Title XX services has lessened in the foreseeable future is virtually nonexistent. Therefore, the court's award essentially locks in a set amount of funding for the Navajo Nation.

Despite Eleventh Amendment concerns, the court of appeals affirmed this award on the basis of this Court's opinion in *Papasan v. Allain*, 478 U.S. 265 (1986), ruling that the relief granted was prospective only and designed to rectify an ongoing violation of federal law. (App. 9-11.) Petitioners challenge this result as a violation of the Eleventh Amendment to the United States Constitution and as

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[6] Both of the lower courts assumed that Title XX funds are state funds for purposes of an Eleventh Amendment analysis. Petitioners recognize that there may be a split among the circuits on this issue. *See Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. denied sub nom, Paschal v. Didrickson*, 112 S. Ct. 992 (1992) (White, J., dissenting). However, petitioners do not raise this issue as a basis upon which to grant certiorari. It is petitioners' position that the funds should be considered to be state funds.

an unwarranted intrusion into the state's ability to make its own budgetary decisions.

Pursuant to Sup. Ct. R. 10.1.c, this Court can grant a review on writ of certiorari "[w]hen . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Petitioners submit that the rationale for granting certiorari in this instance is two-fold.

First, the lower courts' interpretation of *Papasan* exceeds what this Court has indicated would be acceptable in fashioning a remedy for ongoing violations of constitutional law. This Court has never, under the rubric of prospective injunctive relief, addressed an award of a sum certain in a context such as this one. Therefore, this is a unique and important question which should be settled by this Court concerning the correct interpretation of *Papasan*. Should this Court permit the court of appeals' opinion to stand, it could become a lodestar for the erosion of the states' Eleventh Amendment immunity.

Second, this is a case in which the lower courts have decided a federal question – prospective relief pursuant to *Ex parte Young* and its progeny – in a manner which is inconsistent with this Court's rulings. The award of $446,277, for the foreseeable future, is an abuse of discretion based upon the facts of this case. It violates all notions of comity and deference to local governmental authorities which this Court has recognized when fashioning remedies to alleviate ongoing constitutional deprivations. Further, the lower courts have erected a hurdle

for the state to surpass every year: in order to effect a change in funding, the state must return to district court to justify its decision and to avoid being held in contempt of court. Comity dictates that a state should not be forced to manage its yearly budgetary process in such a fashion absent extraordinary circumstances that are not present in this case.

II.

The Injunction Ordered by the District Court Requiring that Officials of the State of New Mexico Fund a Program for the Navajo Nation in the Minimum Amount of $446,277 Per Year Until the State Can Demonstrate that a Lesser Level of Funding is Justified Based Upon the Navajos' Need for Services Violates the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment to the United States Constitution confirms that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). The decisions of this Court, beginning with *Ex parte Young*, have delineated the scope of the Eleventh Amendment vis-a-vis claims of constitutional deprivations. However, as noted by this Court: "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Edelman v. Jordan*, 415 U.S. 651, 667 (1974).

Well-established precedent teaches us that federal courts can grant prospective injunctive relief to prevent a continuing violation of federal law. *Ex parte Young*, 209 U.S. at 155-56. "Remedies designed to end a continuing

violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Furthermore, such relief can be awarded "even if a remedy that might require the expenditure of state funds, would ensure 'compliance *in the future* with a substantive federal-question determination' . . . ." *Papasan v. Allain*, 478 U.S. 265, 282 (1986) (quoting *Milliken v. Bradley* (Milliken II), 433 U.S. 267, 289 (1977)).

Nonetheless, this Court has consistently refused to extend the reasoning of *Ex parte Young* to claims for retrospective relief. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). "[C]ompensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green v. Mansour*, 474 U.S. at 68. The Eleventh Amendment bars relief which, no matter how styled, is tantamount to a compensatory award for past constitutional deprivations. *See, e.g., Green v. Mansour*, 474 U.S. at 69-70; *Edelman v. Jordan*, 415 U.S. at 664-68.

In cases such as the one at bar, the courts must address and meet the challenge of determining the extent to which they can proceed to fashion an appropriate remedy without breaching the boundaries of the Eleventh Amendment. As noted on more than one occasion by this Court, "[i]n discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought, . . . and will be guided by the policies underlying the decision in *Ex parte Young*." *Papasan*, 478 U.S. at 279 (citation omitted). Furthermore, this Court has never indicated "that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out

of the state treasury, so long as the relief may be labeled 'equitable' in nature." *Edelman v. Jordan*, 415 U.S. at 666.

Petitioners submit that the District Court of New Mexico overstepped the fine line of what is permissible in this case in ordering "that defendants are enjoined from failing to fund the Navajo Nation's Title XX contract services for the present and subsequent years at less than $446,277, unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country." (App. 24.) Taken in the proper context of the district court's other rulings, this award is barred by the Eleventh Amendment.

Both the district court and the United States Court of Appeals for the Tenth Circuit relied primarily on *Papasan v. Allain*, 478 U.S. 265 (1986) to support this portion of the relief granted. Petitioners submit that both courts badly misconstrued this Court's intent in *Papasan* in so ruling.

This Court did not address the merits of a specific grant of relief in *Papasan*. Rather, the issue before the Court was whether the petitioners' equal protection claims, as contained in their complaint, were barred by the Eleventh Amendment. The underlying facts in *Papasan* concerned the disparity in the funding of various schools in Mississippi. This Court held that the claims were not barred and indicated that a constitutional remedy could be fashioned which would ensure future compliance with federal law. *Papasan*, 478 U.S. at 282. While this Court might have envisioned some type of order which required that the state equitably distribute school

funds, petitioners doubt seriously that this Court considered an order of relief as specific and onerous as the one in the case at bar.

Indeed, the additional relief ordered by the district court herein probably fits the mold of what was being contemplated by this Court in *Papasan*. The district court further ruled "that defendants are enjoined from administering and allocating Title XX funds in any manner that fails to ensure the availability of Title XX services to Navajo Indians at the same level, relative to their need, as those services are available to all New Mexicans." (App. 24.) Surely, it would have been more appropriate for the district court to combine this ruling with one directing the Secretary to reconfigure his allocation of Title XX funds and submit it to the court for review. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 51-52 (1990) ("local officials should at least have the opportunity to devise their own solutions to these problems"). *See also Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d 986, 993 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988) ("if it should be decided, on remand of the *Papasan* case, that the Constitution does not permit the 'benefit' of the school lands to be distributed unequally, the appropriate remedy would seem to be an order directing the authorities to recalculate their division of the benefit and to start distributing the benefit in equal shares").

Or, in the alternative, the district court could have ordered that the 1991 funding be restored to the level of $446,277 in addition to the above injunction. If, as the court found, the next year's funding would be based upon this figure, there should have been no need to order that the funding continue in the same amount. What the court did, in essence, was to presume that the State of

New Mexico would continue to discriminate against the Navajos. That was completely inappropriate under the facts of this case.

Instead of affording the state an opportunity to correct the finding of discrimination, the court chose to take the amount of funding which had been recommended to the Secretary in 1985, $446,277, and ordered in 1991 that the State begin funding the Navajo Nation's program in that amount once more. The order continues in perpetuity "unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country." (App. 24.) As a practical matter, those who are familiar with the Navajo people and their needs recognize that, at least in the foreseeable future, the state will never be able to prove that there is a lesser need for services. The order does not permit the state to consider any of the myriad of other factors which might affect funding decisions in a program such as Title XX. Those include such matters as the level of federal funding, the level of need of competing constituencies, including other minority constituencies, the possible refocus of the use of the funds, legislative redirection of the funds, and changes in the program mandated by the federal government.

Furthermore, by removing the state's ability to use its discretion in the allocation of funding up to the amount of $446,277, the district court placed the Navajos' needs above all of the other people in New Mexico, including the large segment of the population which is Hispanic. Such an action would appear to be more in the nature of compensation for past deprivations rather than permissible prospective relief.

In addition, the court completely ignored the changes in the manner in which Title XX funds are distributed. The Navajo Nation now receives a block grant and does not have to submit a bid and compete for those monies. Instead, it has the option of submitting bids for additional funding over and above the block grant. Again, this demonstrates the court's complete disregard for the need to defer to the state in the first instance and accord it an opportunity to remedy the violation.

Such a restriction upon a state's decision-making abilities concerning the funding of its programs constitutes an impermissible and unwarranted intrusion into the state's affairs. This Court has "emphasized that although the 'remedial powers of an equity court must be adequate to the task, . . . they are not unlimited,' . . . and one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. at 51 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). The district court did not, in fact, fashion a remedy which was no broader than necessary to accomplish its goal; rather, it overstepped the boundaries drawn by the Eleventh Amendment and this Court.

Furthermore, the award of $446,277, cannot truly be viewed as ancillary to other equitable relief as required by *Ex parte Young*. When an order has a substantial impact upon the state's treasury, it will not pass constitutional muster unless it is ancillary to some other form of prospective relief. *Quern v. Jordan*, 440 U.S. 332, 349 (1979); *Edelman v. Jordan*, 415 U.S. at 668; *Sutton v. Evans*, 918 F.2d 654, 658 (6th Cir. 1990); *Cotton v. Mansour*, 863

F.2d 1241, 1248 (6th Cir. 1988), *cert. denied*, 493 U.S. 1042 (1990); *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d at 992-993.

This portion of the court's order, however, stands alone in that it must be satisfied separate and apart from the other relief granted. Compliance with its dictates may or may not satisfy the injunction "from administering and allocating Title XX funds in any manner that fails to ensure the availability of Title XX services to Navajo Indians at the same level, relative to their need, as those services are available to all New Mexicans." Indeed, in any given year the latter might be satisfied with funding less than the mandated $446,277. Therefore, the directive to pay $446,277 every year is not ancillary to any other injunctive relief and violates Eleventh Amendment tenets.

In sum, the district court overstepped its authority and the bounds of the Eleventh Amendment by ruling as it did. The court's grant of $446,277 to the Navajo Nation with virtually no restrictions does not comport with the dictates of *Ex parte Young* and its progeny. Rather, it constitutes an award of compensatory damages in the guise of prospective relief and "not only an end run around *Edelman*, but an 'end-run around the legislature's allocation of state funds.' " *Kelley v. Metropolitan County Bd. of Educ.*, 836 F.2d at 995 (quoting *United States v. Texas Educ. Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987)).

III.

The Decision of the Court of Appeals Affirming the Issuance of an Injunction Against State Officials to Remedy a Single Instance of Discrimination that is Not Continuing Violates the Eleventh Amendment to the United States Constitution and Conflicts With Decisions of this Court and Other Circuits.

A careful study of the district court's opinion gives rise to another basis upon which to find that its award violates Eleventh Amendment principles. In order for a federal court to have power to award prospective injunctive relief pursuant to the *Ex parte Young* analysis, there must be a finding of a continuing violation of federal law. *Green v. Mansour*, 474 U.S. at 71-73. A past act of discrimination, which no longer continues, is insufficient. Petitioners submit that the district court's findings fall into the latter category and not the former.

The only findings of the district court which bear on the issue of whether there was a continuing discrimination against the Navajos are limited. Furthermore, the foundation for all of them is a finding that the 1985 funding cut was discriminatory. The court bootstrapped this one-time incident of alleged discrimination into a continuing violation of federal law with one additional finding of fact and one conclusion of law. The court found that "[s]ince at least 1983, the amount of funding a contractor received each year has been based primarily on the amount it received in the previous year." (App. 21.) It then ruled: "[b]ecause the amount of funding is based each year on the previous year's amount, the Tribe's present level of funding is the result of defendants' unconstitutional decision in 1985." (App. 22.)

Petitioners submit this does not constitute the type of ongoing discrimination contemplated by this Court in *Papasan*. The district court did not make a specific finding that the funding in 1991, when it entered its opinion, constituted a deprivation of the Navajos' equal protection. There was no analysis on a year-by-year basis for the years subsequent to 1985, that the funding deprived them of their constitutional rights. Rather, the court assumed that a one-time deprivation continued into the future simply because the funding of each successive year was based "primarily" on the previous year's amount. Indeed, this was in spite of the court's acknowledgement that other factors, not just the previous year's funding, influence the determination of allocations.

Furthermore, the court's award in a sum certain essentially presumes that officials of the State of New Mexico will continue to deprive the Navajos of their equal protection rights. Again, this is based upon a one-time finding of discrimination. The state had been providing funds to the Navajo Nation under this program since 1975 without any charges of unequal treatment being levied against its officials prior to 1985. The supposition that the discrimination does and will continue to persist based upon a funding decision made in 1985 is unwarranted under the facts of this case.

Even if this Court were to consider the district court's findings sufficient to establish a continuing constitutional deprivation, petitioners submit that the remedy fashioned by the court constitutes an abuse of the court's powers and is in contravention of the principles of comity. Although a violation might be found, the power of a federal court to issue injunctive relief is not unlimited.

First, the nature of the "remedy is to be determined by the nature and scope of the constitutional violation" and thus must be "related to 'the *condition*' alleged to offend the Constitution." *Milliken II*, 433 U.S. at 280 (quoting *Milliken v. Bradley* (Milliken I), 418 U.S. 717, 738 (1974) (emphasis in original)). Second, the decree must be limited to remedial purposes. *Milliken II*, 433 U.S. at 746; *Milliken I*, 418 U.S. at 746. Finally, the remedy must "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 281. *See also Missouri v. Jenkins*, 495 U.S. at 51-52.

As indicated, " '[o]nce a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." ' " *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976) (citations omitted) (quoting *Milliken I*, 418 U.S. at 744)). However, the remedy in this case was not drawn as narrowly as it should have been given the facts. A one-time finding of a constitutional deprivation does not justify the onerous award of $446,277, in essence in perpetuity.

Less burdensome alternatives would have been more appropriate. For example, the court could have ordered the state to devise an alternative plan of funding of the various Title XX contracts. Or, the court could have ordered that the funding for 1991 be reinstated to the level of $446,277 without requiring that it continue from year to year.

The facts of this case simply do not warrant the award granted. This is not a case concerning long-standing segregation in the school systems or prison conditions. Even in those cases, however, the federal courts have shown deference to the states and local governmental bodies and have permitted them the first opportunity to remedy the constitutional violations. The courts have been reluctant to award relief in such a manner that it intrudes into the state's ability to make funding decisions. The district court in this instance, however, accorded no such deference to state officials. It abused its discretion, and its award should be vacated.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. In the alternative, petitioners respectfully request the Court to vacate that portion of the court

of appeals' opinion affirming the award of $446,277 per year and remand for further consideration.

Respectfully submitted,

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January 20, 1993

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NAVAJO NATION, Plaintiff-Appellee, and WALLACE WATCHMAN, MARY ANN WATCHMAN; LINDA FRANK; IRENE BENALLY; PAULINE PINTO BEGAY; MARY LAPHIE; ESTHER LEE; ELIZABETH ROY; IRENE DICK; LUCILE BENALLY; ESTHER B. JOE, Plaintiffs-Intervenors v. STATE OF NEW MEXICO; JUAN R. VIGIL, in his official capacity as Secretary of the New Mexico Human Services Department, Defendants-Appellants.	)	No. 91-2187

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CV 86-576 M)

(Filed Sept. 22, 1992)

Susan K. Rehr, Assistant General Counsel, New Mexico Human Services Department, Santa Fe, New Mexico, for Defendants-Appellants.

Henry S. Howe, Navajo Nation Department of Justice, Window Rock, Arizona, for Plaintiff-Appellee.

Before HOLLOWAY and SEYMOUR, Circuit Judges, and ROGERS, District Judge.*

SEYMOUR, Circuit Judge.

Each year the federal government provides a sum of money for human services to each state under Title XX of the Social Security Act, 42 U.S.C. § 1397 (1981). This appeal arises out of New Mexico's decision in 1985 to cut by more than forty percent the portion of these funds it had previously allocated to the Navajo Nation for home care, from $466,277 to $278,000, in order to fund foster care citizen review boards. The record amply supports the district court's finding that the cut was motivated in part by discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment. We therefore affirm.

I.

New Mexico's Human Services Department receives and administers Title XX block grants, offering social

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* Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

services to its residents through both direct and contract services. Direct services are operated and staffed by state employees. Contract services are performed by independent service providers, either government entities or nonprofit organizations, which accept state funds annually in exchange for servicing particular needs and populations. Because of the Navajo Nation's unique linguistic, cultural, and economic needs, the state has chosen not to offer direct home care to Navajos, but rather to provide services pursuant to contracts with the Nation. The Nation then provides social services to its members through two Navajo social service agencies.

In each of fiscal years 1982, 1983 and 1984, the Navajo Nation received $466,277 for home care contracts.[1] In 1985, the state followed its standard procedure of soliciting requests for contracts, evaluating the requests, and awarding selected contracts. The Navajo Nation submitted its request, and the state initially recommended a contract of $446,277, the amount of the previous year's contract minus $20,000 that the Nation had underspent.

The district court found that the 1985 recommendation, like the others, would have been adopted unchanged had the state not found itself with a budget shortfall in the spring of 1985. In November 1984, the state of New Mexico entered into a consent decree in the case of *Wolfe v. State of New Mexico,* No. 80-623 (D.N.M. filed Nov. 21, 1984). This stipulated court order required

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[1] Because of a change in the fiscal year, the 1982 fiscal "year" was only nine months long. The figure given here for fiscal 1982 is an annualized value.

the state to form citizen review boards to oversee foster child placement, at an estimated cost of $315,000. The Human Services Department initially approached the state legislature for the additional funds, but was able to obtain only $127,000. After examining its other human services programs, the state took the remaining $188,000 required for the citizen review boards from the Navajo Nation home care contract.

Following a three-day bench trial, the district court held that the cut in funding was discriminatory on its face because it signaled out Navajos for unfavorable treatment. The court held alternatively that the cut was motivated by discriminatory intent and had a disparate impact on the Navajo community. The state argues on appeal that the court misinterpreted the law and made clearly erroneous fact-findings. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 (1984).

II.

The district court held the spending cut facially discriminatory. It was thus held presumptively invalid because it was not narrowly tailored to serve a compelling government interest and less burdensome alternatives were available. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). The state's decision to cut $188,000 from the Navajo Nation's home care budget did have an immediate, direct, and predictable consequences [sic] affecting the Navajos alone. Unlike a state-sponsored employment test on which

racial minorities tend to receive lower results, *see Washington v. Davis*, 426 U.S. 229 (1976), or a zoning ordinance which affects a disproportionately large number of minorities, *see Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), the spending cut challenged here resulted in adverse consequences exclusively effecting the Navajo community.

We are troubled, however, about evaluating the state's conduct here under the standards developed for facially discriminatory state action. The targeted impact on the Navajo Nation from the spending cuts can be viewed as existing because the Nation and the state of New Mexico have agreed that home services are best provided for that community through the Nation itself. If the Navajo population were to receive home care services directly from the state social service agency, as part of the entire direct services budget, the decision to underfund the relevant programs would not specifically affect a racially identifiable population. We would instead be presented with a clear "disparate impact" case which, as we discuss below, would be subject to a different set of legal standards. We need not decide in this case whether a decrease in state funding funneled through a race or nationality-based organization is facially discriminatory, however, because the district court's decision stands easily on its alternative disparate impact analysis.

A disparate impact challenge, unlike a facial challenge, requires a showing of discriminatory intent. *Arlington Heights*, 429 U.S. at 265. It is not necessary to show that discrimination was the sole, or even the primary, motivation; indeed, the Supreme Court has commented on the futility of such an inquiry. *Id.* Rather,

> "[d]iscriminatory purpose" . . . implies that the *decisionmaker . . . selected or reaffirmed a particular* course of action *at least in part "because of,"* not merely "in spite of," its adverse effects on an identifiable group.

Feeney, 442 U.S. at 279 (emphasis added).[2] "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Id.* at 277. If discrimination is a factor, the state action violates the Equal Protection Clause guarantee against invidious discrimination.

Arlington Heights lists some of the factors that may be relevant to a finding of discrimination, particularly where the evidence is circumstantial rather than direct.

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural

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[2] The state argues that *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979), limits *Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), by requiring that discriminatory intent be the *primary* motivation of the defendant. This argument relies on the state's omission of several key words whenever it quotes *Feeney*, and is so trivial that we would not address it separately did it not form the backbone of the state's appeal. In response, we need only reiterate the governing standard and emphasize the words the state frequently omits: discriminatory motive exists when action is taken *"at least in part* 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (emphasis added).

> sequence also might afford evidence that improper purposes are playing a role. . . .
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body. . . .

429 U.S. at 267-68 (citations omitted).

The district court wrote a lengthy and thoughtful opinion accurately stating the law regarding discriminatory impact challenges and finding facts on the basis of that law. The record shows that Juan Vigil, Secretary of the Human Services Department at the time of the challenged decision, had initially approved the Navajo Nation's 1985 contract for $446,277, based on the community's needs and other relevant factors. The district court found that "[t]he funding reduction occurred outside the normal procedural process and without considering the normal substantive criteria. Consideration of the usual factors would have led to a decision to fund the Navajo Nation for home care services at least in the amount of $446,277." Appellants' App. at 70. This departure from the normal procedures for making funding decisions supports the district court's finding of discriminatory intent.

The district court also found that defendant Vigil "knew that only Navajos would suffer the consequences" of the spending cut, *id.* at 71, and that "[t]he decision to obtain funding for the citizen review boards only from the Navajo contract was based primarily on concerns about political retaliation if cuts were made elsewhere in the state," *id.* at 71-72. This latter finding is supported by evidence that the Navajos are disadvantaged in the political process in New Mexico, and by comments from a

Department official that "political" constraints produced a decision to cut contract services rather than direct home care services which were budgeted at more than $800,000, *see* rec., Tr. 9/12/90 at 25.

The state asserts that the Human Services Department officials first decided to take the $188,000 from contract, as opposed to direct, services to avoid massive layoffs. This justification, however, does not further the state's argument. A cut in the direct services budget would have destroyed state jobs; cutting the contract services instead forced any necessary layoffs into the non-state sector. When the state then decided to take the entire amount from the Navajo Nation contract, these layoffs fell exclusively on Navajo Nation service providers. The district court found that "[t]he 40% reduction in the Navajo Tribe's home care program resulted in the termination of 40% of the home care workers in Navajo Indian Country." Appellants' App. at 70. Thus, the state's decision actually supports the court's finding that the state chose to place the full burden on the Nation because the state would lose less politically by doing so.

The state also claims that home care was a low priority contract service, and that of the home care contracts, only the contract to the Navajo Nation was sizeable enough to remain viable after so large a cut. The district court found to the contrary that "[o]ther contracts could have been reduced along with reductions to the Navajo contract without destroying the viability of their programs." *Id.* at 71. The record supports this finding. Were the home care budget divided among Navajos and non-Navajos, the Department could have taken at least some of the shortfall from the $276,990 budgeted for non-

Navajos. Only by dividing the home care budget for non-Navajos into smaller component parts does the state create a financing scheme in which the Navajos alone have a large budget.

To the extent the district court's finding of discriminatory intent involved a credibility determination, we give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Based on our review of the record and giving due regard for the district court's assessment of the witnesses' credibility, we cannot say the court's conclusion that "defendants were motivated in part by an intent to discriminate against Navajo Indians," Appellants' App. at 73, was clearly erroneous.

III.

After finding liability, the district court enjoined the state from "failing to fund the Navajo Nation's Title XX contract services for the present and subsequent years at less than $446,277, unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country," and from "administering and allocating Title XX funds in any manner that fails to ensure the availability of Title XX services to Navajo Indians at the same level, relative to their need, as those services are available to all New Mexicans."[3] *Id.*

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[3] The state argues at some length that since its decision was rational and not invidious, the court has impermissibly interfered with the administrative process. *See Dandridge v. Williams,*

at 75. In so doing, the court relied on *Papasan v. Allain*, 478 U.S. 265, 282 (1986). The court recognized that the Eleventh Amendment bars the award of money damages against the state, citing *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578 (1991). *See* Appellant's App. at 74. However, the court held that *Papasan* permits declaratory and injunctive relief "even if such a remedy requires the expenditure of state funds in order to insure 'compliance *in the future* with a substantive federal-question determination,' " *id.* (quoting *Papasan*, 478 U.S. at 282).

The district court was correct that an injunctive award is not invalid merely because it requires the state to expend money from its treasury in order to comply. *Edelman v. Jordan*, 415 U.S. 651 (1974). The award may not, however, compensate the plaintiff for the government's past illegal acts; it may only remedy a present and ongoing violation, in this case an ongoing disparity between the level of funding to Navajos and non-Navajos. *See Papasan*, 478 U.S. at 278-82.

The district court's order meets the requirements of *Papasan*. When a state begins with a system in which funds are being distributed equitably among various racial groups, and then cuts one group's funding discriminatorily without showing that that group's need has lessened, the undeniable result is a disparity in the adequacy of services provided among groups. If the Navajo

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397 U.S. 471 (1970). *Dandridge's* prescribed rationality review for state spending decisions applies only when the decision is *not* in fact invidious. Since the state *did* discriminate invidiously, the district court had authority to impose a remedy.

Nation was receiving equal treatment before the unilateral cut, it must afterwards have been receiving proportionately less. Moreover, because each year's funding is determined according to the previous year's, the disparity continues to this day. Absent a showing that the Navajos' need for home care services has decreased, or that other legitimate factors make a decrease in the Navajo Nation's home care budget necessary, the state may not continue its disparately low funding based on the unconstitutional cut.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION, Plaintiff, WATCHMAN, et al, Plaintiff-Intervenors, v. STATE OF NEW MEXICO, et al., Defendants.	)	No. 86-576-M Civil

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

(Filed JUL 15 1991)

This matter came on for bench trial on September 10, 11, and 12, 1990. The following are my Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52. The stipulation of facts, filed jointly by the parties at the time of trial, is deemed incorporated in these Findings and Conclusions.

Findings of Fact

1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1343 and 1362.

2. Plaintiff's claim for relief arises under 42 U.S.C. § 1983; 42 U.S.C. § 1988; 42 U.S.C. §§ 1397 to 1397(f); the

Fourteenth Amendment to the United States Constitution; the Indian Commerce Clause, U.S. Const. Art. 1, § 8, cl.3; and 32 U.S.C. § 7301.

3. The State of New Mexico received money from the federal government under Title XX of the Social Security Act, 42 U.S.C. § 1397 (Title XX) to provide social services to residents of the State of New Mexico each year between 1975 and the present.

4. Title XX, which gives money to the states in block grants, mandates no particular substantive services. On the contrary, it envisions state flexibility in determining the services which will, given the conditions in the state, be directed at the Act's goals.

5. New Mexico's Human Services Department (HSD) receives and administers Title XX block grants. In 1985, HSD was divided into three divisions: the Administrative Services Division (ASD), the Income Support Division (ISD), and the Social Services Division (SSD).

6. SSD has primary responsibility for administering the Title XX program. A fraction of the Title XX block grant goes to administrative expenses; the bulk goes to social services such as those listed in the Title XX statute.

7. By 1985, New Mexico had prioritized its social services programs. Child abuse, adult abuse, substitute care, and adoption services were high priority services. Lower priority services were day care for handicapped adults, home care, information and referral, family planning, and support for health care.

8. SSD funds two types of social services providers with Title XX money. One type of provider is a county

office of SSD which is an arm of the state agency. County office employees are state employees. County office services are called direct services. The other type of service provider is a community organization, which may be a governmental entity such as a city or county or a non-profit organization. Community organization providers contract with SSD to provide Title XX services. Community organization services are contract services.

9. The Secretary of HSD, who was Juan Vigil in 1985, has the ultimate authority to decide how to spend all the money HSD receives including Title XX money, other federal funds, and state funds except to the extent that the Legislature of New Mexico mandates a particular distribution of state funds within the HSD budget in its appropriation bills.

10. The 1985 Appropriation Bill mandated the distribution of state general funds in the budgets of the three branches of HSD by line items. Those items determined the allocation of state general funds for the provision of direct services and for contract services.

11. The 1985 Appropriation Bill provided that transfers of state general funds between line items was permissible and transfers between sub-divisions of an agency, i.e., ASD and SSD were also permissible so long as the transfer did not exceed 4% of that sub-division's appropriation.

12. Amounts indicated in the 1985 Appropriation Bill by line items under the category of federal funds, as opposed to state general funds and totals, were provided for informational purposes only and were not appropriations.

13. In 1985, the legislature mandated no particular level of spending of any federal funds on any line items or any social services diversion program.

14. In 1985, the Secretary's authority to allocate state general funds was somewhat limited by the legislature's appropriation bill.

15. In 1985, the Secretary's authority to allocate federal funds including the Title XX block grant was only limited by the federal statutes themselves.

16. The Navajo Reservation and nearby Navajo Indian Country have several characteristics that distinguish them from the rest of the State of New Mexico. There is a higher birth rate, thus a greater proportion of children, higher unemployment rate, higher drop-out rate, and a greater percentage of people living at or below poverty level.

17. The need for social services is greater on the Navajo Reservation and Navajo Indian Country than it is on a whole in the rest of New Mexico.

18. Because of unique difficulties in providing social services to Navajos, New Mexico decided at the beginning of the Title XX program that it would provide social services to Navajos by contracting with the Navajo Nation's Social Service Agency, which in 1985 was called the Division of Social Welfare.

19. Prior to 1985, New Mexico decided that providing direct services from HSD's offices in Gallup and Farmington to Navajos would be inefficient and ineffective, given language and cultural differences.

20. While the Gallup and Farmington offices could in theory provide direct social services to Navajos, in 1985, they did not.

21. Between 1983 and 1987, New Mexico provided no direct home care or child protective services to Navajos on Navajo land.

22. Between 1975 and the present, New Mexico entered into contracts with or awarded block grants to the Navajo Nation in which the State gave the Navajo Nation a part of its Title XX block grant and the Tribe provided Title XX social services through its two social service agencies.

23. Between 1975 and the present, New Mexico entered into contracts with or awarded block grants to the Navajo Nation and other community organizations after a formal process in which those organizations competed for funds to provide Title XX service. New Mexico required the Navajo Nation to participate in that process on the same basis as all other organizations in the State.

24. After 1980, the contracting process did not change from year-to-year except in the speed of its completion.

25. In 1985, the contracting process was the same as it had been in previous years.

26. In 1985, as in previous years, the process that SSD followed in awarding contracts, including those with the Navajo Nation, was as follows:

> 1. SSD employees developed Request for Proposals (RFP's), which asked for submission of proposals to provide social service, and sent

them to the interested organizations in early February.

2. Organizations submitted proposals to SSD in early March 1985.

3. Review teams reviewed the proposals in the Spring of 1985. Review teams consisted of the county office manager near the organization's location, a local government representative, a fiscal manager, and a program specialist. The review team had meetings with organizations at which concerns about the RFP's would be discussed.

4. The review team prepared and forwarded recommendations on the contract awards to the Bureau chief and director of SSD.

5. The director revised the review team's recommendations and submitted her final recommendations to the Secretary of HSD who adopted her recommendations.

6. HSD wrote contracts based upon those recommendations.

7. SSD sent contracts to organizations for signature in early June.

8. Organizations sent the contracts back for HSD signatures.

9. Contracts were executed.

27. The review team considered the following aspects of each proposal from an existing contractor, including the Navajo Tribe:

1. The community's feedback on the program.

2. The State's working relationship with the program.

3. The quality of the program.

4. Whether the program met clients' and community's needs.

5. Whether any problems existed or were foreseen in the program.

6. The program's strengths and shortcomings.

7. The number of clients served per month.

8. Any administrative or fiscal problems of the program including expenditure rate.

28. Apart from the high unit cost of delivering services on the Navajo land, the speed of the Navajos' submission of bills and need for training, the review team had no concerns about the Navajos' RFP and the Navajo Tribe was not listed among problem programs by the contract manager.

29. In 1985, the director initially recommended awarding the Navjos [sic] $446,277 because that was the level of funding the Navajo Nation received in the previous year, less the approximate amount by which they had underspent in the previous year.

30. In 1985, the Navajo Nation submitted a proposal to provide home care services for $512,905. After being subjected to the formal review process, the Secretary approved the director's recommendation that the Navajo Nation be awarded $446,277 for the provision of home care services to Navajos in Navajo Indian Country.

31. However, in the end, the Secretary approved the director's later recommendation that $168,000 of the Navajo Nation's home care contract be diverted to fund another social service program. The home care contract that was eventually entered into between New Mexico and the Navajo Nation was for $278,000; approximately 60% of the original recommended award.

32. The funding reduction occurred outside the normal procedural process and without considering the normal substantive criteria. Consideration of the usual factors would have led to a decision to fund the Navajo Nation for home care services at least in the amount of $446,277.

33. The 40% reduction in the Navajo Tribe's home care program resulted in the termination of 40% of the home care workers in Navajo Indian Country. The number of workers declined from 23 to 12. The number of units of service declined from 27,000 to 16,600. The number of clients that could be served declined from 400 to 240. Cases of adult neglect in Navajo Indian Country increased accordingly.

34. The other social service program for which the $168,000 was diverted was citizens' review boards. The HSD was required to fund citizens' review boards in order to comply with a November, 1984 stipulated court order in *Wolf v. New Mexico*, No. CIV 80-623-JB (D.N.M. Nov. 21, 1984).

35. The citizens' review boards were groups of volunteers charged with reviewing the cases of children placed in foster care or institutional care and with expediting their final placement.

36. The Secretary's decision to divert the money needed for citizen review boards was based on the director's consideration and rejection for all other funding options.

37. The Secretary knew that only Navajos would suffer the consequences of the decision to reduce the Navajo Nation's home care contract.

38. When the Secretary made the decision to reduce the State's allocation to the Navajo Nation, the Tribe had no other home care program.

39. The Secretary did not know whether the Tribe had alternative sources of funding for a home care program.

40. When the Secretary made the decision to reduce the State's allocation to the Navajo Nation, no direct home care services were provided by the San Juan and McKinley County offices to Navajos living within Navajo Indian Country.

41. Other contracts could have been reduced along with reductions to the Navajo contract without destroying the viability of their programs.

42. The decision to obtain funding for the citizen review boards only from the Navajo contract was based primarily on concerns about political retaliation if cuts were made elsewhere in the state.

43. Navajos have been and remain disadvantaged in the political process within New Mexico.

44. Since at least 1983, the amount of funding a contractor received each year has been based primarily on the amount it received in the previous year.

Conclusions of Law

1. This court has jurisdiction over the parties and subject matter of this action. Venue is properly laid in this District.

2. The Navajos are a discrete racial, ethnic, and political group that traditionally has been disadvantaged in the political process, *see, Yanito v. Barber,* 348 F.Supp. 587, 591 (D.Ut. 1972), and is a "suspect class" for purposes of equal protection analysis. *See San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 28 (1973).

3. The defendant's June, 1985 decision to reduce the Navajo Nation's home care contract was a facially racial classification for purposes of equal protection analysis.

4. When a challenged state action is discriminatory on its face, a showing of discriminatory intent is not necessary. *Wayte v. United States,* 470 U.S. 598, 608, n.10 (1985).

5. The defendants' June, 1985 decision to reduce the Navajo Nation's home care contract had a disproportionate, invidious impact on Navajos including the plaintiff-intervenors and on the Navajo Tribe.

6. Classifications that disadvantage a suspect class are subject to strict scrutiny by "requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest," *Plyer v.*

Doe, 457 U.S. 202, 217 (1982), and to show that no alternative means exist to further that interest in a way that is less burdensome to the suspect class. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

7. Defendants failed to show that the decision to reduce the Navajo Nation's home care contract in 1985 was necessary to serve a compelling government interest.

8. Defendants failed to successfully rebut plaintiff's evidence that alternative funding options existed that would have been less burdensome to the Navajo.

9. Even if the State's funding decision is considered to be facially neutral, it violates the equal protection clause if it was motivated by a discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

10. A discriminatory purpose need not be the sole concern of a state actor, or even the dominant or primary concern, but rather only *a* motivating factor to find a violation of the equal protection clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-6 (1977)

11. In making the funding decision at issue, defendants were motivated in part by an intent to discriminate against Navajo Indians.

12. The decision denied Navajos the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

13. Because the amount of funding is based each year on the previous year's amount, the Tribe's present level of funding is the result of defendants' unconstitutional decision in 1985.

14. The plaintiffs' claims for money damages against the State of New Mexico and against the defendant Juan Vigil are claims against the state itself and are barred by operation of the Eleventh Amendment to the United States Constitution. *Blatchford v. Native Village of Noatak and Circle Village,* ___ U.S. ___, 59 L.W. 4803 (1991).

15. Defendant Vigil, in his official capacity is a "person" for purposes of applying 42 U.S.C. § 1983 when seeking injunctive relief as in this case. *Will v. Michigan Dept. of State Police,* 109 S.Ct. 2304, 2311 n.10 (1989).

16. "Such injunction suits can only be brought against state officers in their official capacity and not against the State in its own name." *Blatchford, supra* at 4805 n.3 (citations omitted).

17. As a result of defendants' 1985 unconstitutional decision, plaintiff and plaintiff-intervenors are entitled to declaratory and injunctive relief even if such a remedy requires the expenditure of state funds in order to insure "compliance in the future with a substantive federal-question determination." *Papasan v. Allain,* 478 U.S. 265, 282 (1986) (citations omitted). Now, Therefore,

IT IS DECLARED AND ORDERED that (1) the Navajo Nation and the Navajo residents of New Mexico are entitled to the same level of Title XX services as are all other state citizens in similar circumstances; (2) that defendants' present allocation scheme for distribution of Title XX funds and the provision of Title XX services discriminates against Navajo Indians in violation of the guarantee of the equal protection of the laws contained in the Fourteenth Amendment to the United States Constitution; (3) that if the normal contract process was followed

in 1985, the Navajo Nation would have received a contract from the State of New Mexico for Title XX funds in the amount of $446,277; (4) that defendants are enjoined from failing to fund the Navajo Nation's Title XX contract services for the present and subsequent years at less than $446,277, unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country; (5) that defendants are enjoined from administering and allocating Title XX funds in any manner that fails to ensure the availability of Title XX services to Navajo Indians at the same level, relative to their need, as those services are available to all New Mexicans; and (6) that plaintiff and plaintiff-intervenors are entitled to their reasonable costs and attorney fees.

/s/ E.L. Mechem
SENIOR UNITED STATES
DISTRICT JUDGE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION,

Plaintiff,

WATCHMAN, et al.,

Plaintiff-Intervenors,

v.

STATE OF NEW MEXICO, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE
(Filed July 15, 1991)
CASE NUMBER: 86-576-M Civil

_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

✓ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED as follows:

(1) That defendants' present allocation scheme for distribution of Title XX funds and the provision of Title XX services discriminates against Navajo Indians in violation of the guarantee of the equal protection of the laws contained in the Fourteenth Amendment to the United States Constitution; (2) That defendants are enjoined from failing to fund the Navajo Nation Title XX contract services for the present and subsequent years at less than $446,277, unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country; (3) That defendants are enjoined from administering and allocating Title XX

runds [sic] in any manner that fails to ensure the availability of Title XX services to Navajo Indians at the same level, relative to their need, as those services are available to all New Mexicans; and

(4) That plaintiff and plaintiff-intervenors are entitled to their reasonable costs and attorney fees.

IT IS FURTHER ORDERED that plaintiff's claims for money damages be, and they hereby are dismissed.

July 15, 1991
Date

ROBERT M. MARCH
Clerk

/s/ Cecilia M. Reyes
(By) Deputy Clerk
Cecilia M. Reyes

(2)

Supreme Court, U.S.
FILED
FEB 25 1993
OFFICE OF THE CLERK

No. 92-1238

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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No. 92-1238

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

Respondents Navajo Nation, et al., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 22, 1992.

STATEMENT OF THE CASE

I. Facts

Petitioners receive federal funds under Title XX of the Social Security Act, 42 U.S.C. § 1397 *et seq.* to provide

social services to residents of New Mexico. *Navajo Nation v. State of New Mexico*, No. 85-576-M Civil, slip op. at 2 (D.N.M. July 15, 1991). Petitioners' Appendix at 13. Petitioners do not utilize state general funds to provide Title XX social services, but only allocate federal funds among the qualifying programs for this purpose.

Petitioners provide few direct social services to Navajos residing in New Mexico, and none in the areas of protective services or home care. *Id.* at 5. Instead, since 1975, the petitioner contracted with the Navajo Nation to provide Title XX social services to Navajo residents of Navajo Indian Country in New Mexico. *Id.* at 5.

In June 1985, the State of New Mexico, Division of Social Services recommended that petitioners fund a contract with the Navajo Nation in the amount of $446,277 to provide Title XX services to Navajos residing in the portion of Navajo Indian Country within New Mexico. *Id.* at 7. This amount was $20,000 less than the amount which had been allocated in the previous year. Petitioners generated the contract documents and the Chairman of the Navajo Nation Council executed the contract on behalf of the Navajo Nation.

At that time Mr. Juan Vigil, Secretary of the New Mexico Human Services Department, was responsible for allocation of the Title XX federal funds received by New Mexico as well as ensuring compliance with a court order[1] to which the New Mexico Human Services Department had stipulated in November 1984 which required

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[1] *Wolf v. New Mexico*, No. CIV 80-623-JB (D.N.M. Nov. 21, 1984).

the maintenance of citizen's review boards. *Id.* at 8-9. $168,000 of the funds needed for these boards were not budgeted for the state fiscal year in either federal or state general funds.

Vigil examined several potential sources to make up the shortfall, and every funding alternative had its drawbacks: reduced services, state employee layoffs, dissatisfied constituents, and angry legislators. Vigil wanted to avoid adjusting the Division of Social Services direct services budget, and avoid reducing contracts across-the-board, even though such a reduction would reduce Title XX services equally throughout the state, primarily because he wanted to avoid the political repercussions of a statewide service reduction. *Id.* at 9-10. Faced with this dilemma, he made an expedient, and unconstitutional, decision. *Id.* at 10.

As a solution to his problem, Vigil took all of the one hundred sixty eight thousand dollars ($168,000) needed for the review boards from the contract with the Navajos. The effect of that decision was that only the Navajo population would shoulder the impacts of the service reduction. Only Navajo employees were laid off. Only services to Navajo were eliminated as a consequence of Vigil's actions, and the threat of political reprisals was minimized. To preserve his political standing elsewhere in the State, Navajo Indian Country Title XX contract funds were cut forty percent (40%). Forty percent (40%) of home care workers in the New Mexico portion of Navajo Indian Country were terminated. The number of clients that could be served dropped from 400 to 240.

It was not just in 1985 that the Navajos bore the burden of Vigil's unconstitutional action. In every year from 1985 through the trial of this case in 1991, petitioners primarily based Title XX contract funding on the level of funding in the previous year. *Id.* at 10. Thus, from 1985 through 1991, Navajos residing in New Mexico continued to suffer the disparate impact of the unconstitutional 1985 funding cut.

Certain of the facts asserted by petitioners are misleading. These alleged facts were rejected by the trial court.[2]

Because the Tenth Circuit Court of Appeals determined that the trial court's findings were supported by the trial record, it rejected petitioners' argument that the trial court's findings of fact were clearly erroneous.

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[2] In some instances the "facts" asserted by petitioners directly contradict the findings of the trial court. For example, petitioners advise this Court that, "Secretary Vigil testified that home care programs, other than the Navajo Nation program, could not remain viable if funding to those programs was reduced." Petition at 4. The trial court found that "[o]ther contracts could have been reduced along with reductions to the Navajo contract without destroying the viability of their programs." *Navajo Nation v. State of New Mexico,* No. 85-576-M Civil, slip op. at 9 (D.N.M. July 15, 1991). Petitioners claim that "[i]t was [Vigil's] opinion that only the Navajo Nation program was of sufficient size to withstand a funding cut and remain viable." Petition at 5. However, the trial court found that "[t]he decision to obtain funding for the citizen review boards only from the Navajo contract was based primarily on concerns about political retaliation if cuts were made elsewhere in the state." *Navajo Nation v. State of New Mexico,* No. 86-576-M Civil, slip op. at 9-10 (D.N.M. July 15, 1991). Petitioners attempt to have this Court redecide issues of fact.

Navajo Nation v. State of New Mexico, 975 F.2d 741, 745 (10th Cir. 1992).

II. Proceedings Below

The trial court examined the historical relationship between Navajos and the petitioners, the history of petitioners' administration of the Title XX program, the departures from the procedural and substantive norms in the decision-making process, the disparate impact of the decision and petitioners' justifications for their actions. *Navajo Nation v. State of New Mexico*, No. 86-576-M Civil, slip op. at 11 (D.N.M. July 15, 1991). The trial court concluded that the funding reduction was both a facially discriminatory act and was motivated in part by an intent to discriminate against Navajos in violation of the right of Navajo Indians to the equal protection of the law. *Id.* Respondents' claims for damages were held to be barred by the operation of the Eleventh Amendment; however, the court ordered a restoration of funding in 1991 and subsequent years to eliminate the ongoing effects of the Constitutional violation. *Id.* at 12-13.

The trial court made factual findings about each of the factors this Court has held to be necessary when a court determines whether an individual operating under color of state law has acted with invidious discriminatory intent. *Id.* at 10-11. The factual record fully supports the trial court's legal conclusions and, as demonstrated below, those conclusions fully warrant the declaratory and injunctive relief awarded by the court.

The trial court held that Vigil had denied Navajos equal protection by cutting federal Title XX funds for

social services, and determined that the constitutional deprivation continued from 1985 through the time of trial. As a remedy, the court required petitioners to allocate in 1991 and future years at least the level of federal Title XX funding for Navajo social services which Navajos would have received absent the unconstitutional actions of petitioners in 1985. The trial court allowed the petitioners to allocate federal title XX funds at a lower level, if they could justify the lower allocation on the basis of reduced need. *Id.* at 13.

The Tenth Circuit determined that the findings of the trial court were fully supported by the trial record. *Navajo Nation v. State of New Mexico*, 975 F.2d 741, 742 (10th Cir. 1992). The Tenth Circuit concluded that the findings were not "clearly erroneous". *Id.* at 745. The Tenth Circuit found that petitioners had invidiously discriminated against Navajos, and that the prospective injunctive relief was an appropriate remedy for the continuing deprivation of equal protection under applicable precedent from this Court. *Id.* at 745-746. Accordingly, the Tenth Circuit properly upheld the decision of the trial court.

The Tenth Circuit decided that it need not reach the issue of whether the trial court was correct in finding that the cuts to Navajo social services were facially discriminatory, because the "district court's decision stands easily on its alternative disparate analysis." *Id.* at 743.[3]

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[3] Respondents continue to assert that the trial court was correct in its decision that the facially discriminatory actions of petitioners constitute a separate and sufficient basis for the prospective injunctive relief.

REASONS FOR DENYING THE WRIT

I. Summary of the Argument

A. Grounds for Grant of Certiorari

This case presents neither of the factors under which this Court should exercise its discretion to grant a review on writ of certiorari. This case does not present, "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1.C. Nor did the Tenth Circuit "decide a federal question in a way that conflicts with applicable decisions of this Court." *Id.*

B. Abuse of Discretion

Petitioners have challenged the fact finding of the trial court; however, this Court will not, absent a very obvious and exceptional showing of error, review findings of fact. *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987). The standard for review in such a case requires that the findings be "clearly erroneous" to merit review by this Court. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). While petitioners have attempted to assert this case as an important Eleventh Amendment matter, it is simply an alleged abuse of discretion case.

C. Eleventh Amendment Claims

The trial court granted prospective relief against petitioners consistent with the principles enunciated in *Ex Parte Young*, 209 U.S. 123 (1908). The prospective injunctive relief imposed was consistent with the exceptions to

Eleventh Amendment bars to suit against the State contemplated in *Ex Parte Young* and its progeny. See *Papasan v. Allain,* 478 U.S. 265 (1986). The equitable remedy fashioned by the trial court was designed to rectify an ongoing violation of federal law.

The trial court's grant of prospective relief met the requirements of *Edelman v. Jordan,* 415 U.S. 651 (1974). Clear distinctions exist between the circumstances of *Edelman* and this case. The trial court denied the Navajo Nation compensatory relief for the years between 1985 and 1991 and granted only declaratory and prospective injunctive relief. Petitioners' reliance on cases which cite the Eleventh Amendment prohibition against the use of state funds to compensate aggrieved parties for past instances of discrimination is misplaced where the injunctive relief is prospective in nature, not retroactive or compensatory.

D. Scope of Prospective Injunction

The trial court was well within its equitable powers in granting prospective injunctive relief which requires petitioners to fund Navajo Title XX social services at a specific minimum amount. The cases which petitioners raise as authority are easily distinguishable from this case, where there was a continuing constitutional violation.

No basis exists for a Writ of Certiorari.

II. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI TO REVIEW AN ALLEGED ABUSE OF DISCRETION.

Petitioners' request for a Writ of Certiorari is ostensibly based on their assertion that an important federal question has been raised in this case; however, no such question exists. Petitioners' challenge is actually to the fact finding of the trial court, and is the integral component of their petition. Petition at 5-10.[4]

The United States Supreme Court will not grant a writ of certiorari to review evidence or discuss specific facts, *United States v. Johnston*, 268 U.S. 220 (1925), to review inferences drawn from evidence, *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175 (1938), or to review judgments based solely on questions of fact, *National Labor Relations Board v. Waterman S.S. Corporation*, 309 U.S. 206 (1940). Findings of fact shall not be set aside unless clearly erroneous. Federal Rule of

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[4] Petitioners attack the trial court's finding that Vigil's primary consideration to cut Navajo Title XX contract funding was based on concerns about political retaliation if cuts were made elsewhere in the state. *Navajo Nation v. State of New Mexico*, No. 86-576-M Civil, slip op. at 9-10 (D.N.M. July 15, 1991). Petitioners' continued assertion that Vigil's decision was based on the fact that only the Navajo contract could sustain a funding cut and remain viable, Petition at 5, ignores the specific finding of the trial court that other programs could have sustained a funding cut and remained viable. *Id.*

Moreover, petitioners continue to attack the finding of the trial court that, since 1983 the amount of funding received by Title XX contractors has been based primarily on the amount they received in the previous year, *id.* at 21, arguing that the trial court erred in this factual finding. Petition, at 9.

Civil Procedure 52(a); *Goodman v. Lukens Steel Company*, 482 U.S. 656 (1987).[5] In the absence of a very obvious and exceptional showing of error, this Court should affirm the determinations of the lower courts.

In this case, the Tenth Circuit reviewed the record and accepted the findings of the trial court relative to the motivation of the defendants to intentionally discriminate against Navajos. *Navajo Nation v. State of New Mexico*, 975 F.2d 741, 745 (10th Cir. 1992). The Tenth Circuit upheld the finding of the trial court regarding the political motivation of the funding cut and the viability of funding cuts to other programs. *Id.* The Tenth Circuit upheld the finding that the constitutional violation was ongoing and continuous. *Id.* at 746. This Court should not grant a Writ of Certiorari in order to review the findings of fact.[6]

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[5] In *Goodman*, this Court stated, "The Court of Appeals did not set aside any of the District Court's findings of fact that are relevant to this case. That is the way the case comes to us, and both courts below, having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task." 482 U.S. at 665.

[6] Petitioners herein always have the option of moving the district court to modify the relief granted if the facts underlying the injunction have changed. *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

III. THE TRIAL COURT GRANTED APPROPRIATE PROSPECTIVE INJUNCTIVE RELIEF CONSISTENT WITH THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The trial court decided this case in accord with this Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), which established an exception to the general Eleventh Amendment bar in situations wherein injunctive relief is sought against a state official who performs acts which violate the Federal Constitution. Here, as in *Young*, the trial court had the authority to issue an injunction to prevent continuing unconstitutional actions of state officials.

Petitioners' reliance on *Papasan v. Allain*, 478 U.S. 265 (1986), is misplaced. *Papasan* states that the grant of injunctive relief against a state official to "bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." 478 U.S. at 278. Here no state general funds are involved, as only federal funds are allocated by petitioners. This fact obviates the need for an Eleventh Amendment analysis.[7]

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[7] In this case, the injunctive relief granted by the trial court involves the allocation of federal funds and not the expenditure of state general funds. In that aspect, the facts in this case more closely resemble those in *Cronen v. Texas Department of Human Services*, 977 F.2d 934 (5th Cir. 1992), *Robinson v. Block*, 869 F.2d 202 (3rd Cir. 1989), and *Bennett v. White*, 865 F.2d 1395 (3rd Cir. 1989). These cases stand for the principle that the Eleventh Amendment does not apply to suits against state officials, in their official capacity, where the funds at issue are federal funds and not state general funds.

The courts below recognized that the current violation of equal protection stems from the actions of Vigil in 1985, and that Navajos continue to suffer from the disparity in distribution of Title XX funds. The prospective injunctive relief granted by the trial court does nothing more than to correct the disparity created in 1985 due to petitioners' allocation scheme.

This case stands in stark contrast to the situation in *Green v. Mansour,* 474 U.S. 64 (1985), relied on by the petitioners. Petitioners have continued to base funding levels for Navajo social services on an unconstitutional 1985 action. *Navajo Nation v. State of New Mexico,* No. 86-576-M Civil, slip op. at 12 (D.N.M. July 15, 1991). Petitioners "continue to deny that the decision in 1985 to cut the funding of the Navajo Nation Title XX program and the current funding of the program constitutes purposeful discrimination against Navajos," Petition at 8, and argue that restoration of the pre-discrimination level of funding is beyond the equitable powers of the federal courts to order. *Id.* at 21. This is precisely the type of constitutional violation which requires an injunction.

Green makes it clear that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68. The reason that declaratory and notice relief were barred in *Green* is that there was, "no claimed continuing violation of federal law and therefore no occasion to issue an injunction." *Id.* at 73.[8]

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[8] In *Green,* this Court was presented with a fact situation wherein the state officials had modified their actions to comply

This Court made its decision against a backdrop of state action where there was no "threat of state officials violating the repealed law in the future." *Id.* at 73.

This case is similarly distinguishable from *Kelley v. Metropolitan County Board of Education,* 836 F.2d 986 (6th Cir. 1987). In *Kelley,* the plaintiffs had "long since won their case." 836 F.2d at 989. The educational and transportation program enhancements required by the district court had long since been implemented by the defendants. It was with this factual predicate that the Sixth Circuit determined that "the vitality of the Supremacy Clause of the United States Constitution will not suffer in any way from our reversal of the district court's order." *Id.* at 990.

Here, the injunctive relief was granted at the same time that the trial court determined that petitioners were continuing a course of unconstitutional deprivation against Navajos begun in 1985. As distinguished from the situation in *Kelley,* Navajos were not receiving equal protection prior to the grant of prospective injunctive relief by the trial court. In this case, affirmance of the prospective injunctive relief granted to Navajos is necessary to maintain the vitality of the Supremacy Clause.

Petitioners' reliance on *Missouri v. Jenkins,* 495 U.S. 33 (1990) again illustrates the deficiency of their petition for review. Petitioners cite *Jenkins* for the principle that "one

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with federal law. 474 U.S. at 65. In this case, the petitioners insist on continuing their violations of federal law.

of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." 495 U.S. at 51; Petition at 19. However, they have truncated this reference to exclude the full expression of this Court, which continued on to state, "Especially is this true where, as here, those institutions are ready, willing, and – but for the operation of state law curtailing their powers – able to remedy the deprivation of constitutional rights themselves." 495 U.S. at 51.

Here, petitioners are neither ready, nor willing to remedy the deprivation of constitutional rights themselves. Indeed, they continue to deny that they have taken unconstitutional action against Navajos. Petition at 8. In only one aspect are petitioners in this case in the same position as petitioners in *Missouri v. Jenkins,* 495 U.S. 33 (1990). They are able to take remedial action to prospectively correct their unconstitutional behavior by restoring the level of Title XX funding for Navajo social services to that amount which had been determined appropriate and necessary prior to their discriminatory actions in 1985.

In *Jenkins,* this Court granted certiorari on the issue of whether the district court had the authority to raise the local property tax which would be required to fund the remedial order. *Id.* at 37. This Court reversed the district court on the limited holding that the district court lacked the power to actually impose the tax itself. *Id.* at 52. Here it is clear that the trial court has not attempted to impose a tax.

While petitioners in *Jenkins* claimed that the remedial order in that case exceeded the equitable powers of the district court, this Court rejected their argument. *Id.* at 53. In Jenkins, the remedial order required the petitioner to undertake a varied set of new or enhanced education and related programs, the cost of which was well in excess of $37 million. *Id.* at 38, n.4.

The prospective injunctive relief granted by the trial court in this case is modest and appropriate. Petitioners obfuscate the issues by focusing on the amount of Title XX funding which is involved in the prospective injunctive relief. Petition at 20. The amount at issue is merely the difference between the figure of $446,277 and the contract amount at which the petitioners would otherwise fund federal Title XX social services for Navajos. In no year between 1985 and 1991 has this difference exceeded $200,000.

Petitioners argue that the trial court exceeded its equitable powers by prospectively restoring in 1991 what petitioners admitted was the appropriate baseline level of funding for Navajo social services in 1985.[9] In light of these conditions and established case law, it is puzzling why petitioners argue that the trial court exceeded its equitable powers by its grant of prospective injunctive relief.

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[9] Petitioners have conceded that "those who are familiar with the Navajo people and their needs recognize that, at least in the foreseeable future, the state will never be able to prove that there is a lesser need for services." Petition at 18.

Petitioners' reliance on *Edelman v. Jordan*, 415 U.S. 651 (1974), is misplaced. In *Edelman*, this Court reversed what was clearly a retroactive grant of monetary damages from state funds. This Court recognized that the district court's decree, "requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose [individual Social Security] applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

This case does not involve payment of an accrued monetary liability. It prospectively requires the allocation of federal Title XX funds to the Navajo Nation at the minimum level ordered by the trial court as a necessary consequence of compliance with equal protection standards. In that manner, this case is clearly distinguishable from *Edelman*.

IV. THE COURT OF APPEALS CORRECTLY AFFIRMED THE PROSPECTIVE INJUNCTIVE RELIEF AS A REMEDY FOR A CONTINUING VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioners have not maintained and do not allege herein that they revisited their 1985 decision to cut the level of Title XX funding for Navajo social services. Even the facts asserted in their Petition show that the baseline level of federal Title XX funding has never been restored since their unconstitutional action in 1985. Petition at 6-7.

The 1985 funding cut was an impermissible, unconstitutional action by petitioners against Navajos. As all subsequent funding allocations were based on the same unconstitutional act, they share that same discriminatory taint.

The trial court found that, "[b]ecause the amount of funding is based each year on the previous year's amount, the Tribe's present level of funding is the result of defendants' unconstitutional decision in 1985." *Navajo Nation v. State of New Mexico,* No. 86-576-M Civil, slip op. at 12 (D.N.M. July 15, 1991). The Tenth Circuit affirmed, reasoning that "[i]f the Navajo Nation was receiving equal treatment before the unilateral cut, it must afterwards have been receiving proportionately less. Moreover, because each year's funding is determined according to the previous year's, the disparity continues to this day." *Navajo Nation v. State of New Mexico,* 975 F.2d 741, 746 (10th Cir. 1992).

The discussions of case law cited in the first portion of their Petition are equally applicable to their second argument. The cases cited by petitioners, *Kelley, Green, Edelman,* and *Jenkins* are all distinguishable from this case.[10]

Petitioners misunderstand that the on-going constitutional violations arise from petitioners' methodology of determining prospective funding allocations based on the previous year's funding allocation. The trial court in this case fashioned an equitable remedy which was tailored to the circumstances of this continuing violation of federal

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[10] Inasmuch as these cases are distinguished above, the respondents will not repeat the analysis here.

law, and merely restored to Navajos the equal protection of which they were continuously deprived from 1985 onward.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied and the trial court's award affirmed in its entirety.

Respectfully submitted,

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No. 92-1238

In The

Supreme Court of the United States

October Term, 1992

STATE OF NEW MEXICO, et al.,

Petitioners,

v.

NAVAJO NATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners file this Reply Brief in Support of Petition for Writ of Certiorari in order to clarify three points raised by respondents. Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on September 22, 1992, for the reasons stated in their Petition. Or, in the alternative, petitioners respectfully request the Court to vacate that portion of the court of appeals' opinion affirming the award of $446,277 per year and remand for further consideration.

REASONS FOR GRANTING THE WRIT

I.

Petitioners Do Not Seek a Writ of Certiorari to Review the Trial Court's Findings of Fact and Conclusions of Law.

Respondents assert that petitioners actually seek a review of the findings of fact and conclusions of law of the trial court and have not raised a credible issue based upon the Eleventh Amendment. They refer to certain of the statements petitioners made in their Statement of the Case, claiming them to be either an attack on the trial court's findings or misleading statements of fact. (Respondents' Brief in Opposition at 4 n.2 & 9 n.4.) However, those statements should be viewed in the context of the Statement and not as challenges to the court's factual findings. If one were to follow respondents' logic, it would mean that the Statement of the Case could only include the court's actual findings and conclusions and no references to testimony of the witnesses.

Petitioners clearly indicated in their Statement of the Case that "the accuracy of the findings of the district court and the [asserted] misapplication of the *Feeney* standard by the courts below will not be addressed further in this petition." (Petition at 8 n.4.) Petitioners are not requesting that this Court review the trial court's findings of fact to determine if they were clearly erroneous. Petitioners have simply noted that they continue to deny the respondents' claims of purposeful discrimination. That does not constitute a challenge to the findings at this stage of the proceedings. Nor, as inferred by respondents,

does it justify an assumption that petitioners will continue to discriminate against the Navajos in the future.

Further, respondents have mischaracterized petitioners' argument that the relief granted constitutes an abuse of discretion by the trial court. Petitioners do not base this Petition on an attack of the trial court's findings of fact and conclusions of law, but rather challenge the nature of the relief awarded in the overall framework of the case. Petitioners claim the trial court's findings and conclusions do not support, in the context of Eleventh Amendment jurisprudence, an award of $446,277 every year from 1991 forward unless a lesser need for services can be demonstrated. Even though the trial court's findings and conclusions were upheld by the appellate court, that does not prohibit a challenge to the relief granted as being an abuse of discretion under the Eleventh Amendment.

The focus of petitioners' argument is two-fold. First, they assert that the award of $446,277 per year is not truly ancillary to any other injunctive relief and, therefore, violates the Eleventh Amendment. Second, they claim that the court's findings of fact and conclusions of law do not clearly establish a sufficiently grievous ongoing violation of the respondents' rights to support the relief granted.

Respondents forward the proposition that, because petitioners deny today that their action was one of purposeful discrimination, petitioners will continue to discriminate against the Navajos, thus justifying the award

as one to rectify an ongoing violation. They state: "petitioners are neither ready, nor willing to remedy the deprivation of constitutional rights themselves." (Respondents' Brief in Opposition at 14.) What they fail to acknowledge is the very heart of petitioners' argument: the trial court **did not** give state officials an opportunity to adjust the funding decision. The court **did not** give petitioners any realistic leeway whatsoever in making its future funding decisions. Rather, the court in essence fined the State of New Mexico for what it perceived to be a past act of discrimination. That action violates Eleventh Amendment tenets and impermissibly interferes with the state's ability to make its own decisions regarding program policies and funding allocations.

II.

Petitioners Need Not Return to the Trial Court to Seek Relief Prior to Petitioning This Court for a Writ of Certiorari.

Respondents claim that petitioners "always have the option of moving the district court to modify the relief granted if the facts underlying the injunction have changed." (Respondents' Brief in Opposition at 10 n.6.) However, petitioners should not be forced to return to the trial court prior to seeking relief from this Court. It is petitioners' position that the relief **based upon the record as it currently exists** violates Eleventh Amendment tenets. To return to the trial court at this juncture would be simply to reargue what was before that body previously. That would be a futile effort and a waste of judicial resources. The issue is not whether circumstances have

changed since the court's decision, but rather whether the court's award was constitutional in the first instance.

In any event, changes in the manner in which the funding was determined for the Navajo Nation had already occurred prior to trial and were presented to the trial court. Thus, there is no reason to believe that the court would view them any differently at this juncture.

Respondents assert that petitioners have admitted that $446,277 "was the appropriate baseline level of funding for Navajo social services in 1985." (Respondents' Brief in Opposition at 15.) That is a misstatement. The trial court awarded $446,277 per year "unless a lower level of funding can be justified by the need for those services on the Navajo Reservation or in Navajo Indian Country." (Petition App. at 24.) Petitioners do concede that, for the foreseeable future, the state will probably not be able to demonstrate that the Navajos' need for Title XX services has lessened. However, that does not justify tieing the state's hands when making its funding decisions concerning the Title XX program to the exclusion of all of the other populations which it serves.

Reality teaches us that no governmental program ever has sufficient funds to fully meet the needs which it was designed to address. Therefore, state officials must evaluate the needs and make appropriate funding decisions. Those decisions will not always be perfect, nor will they necessarily satisfy everyone. However, it is important that the states be given the first opportunity to make those decisions and that their discretionary powers not be completely removed, as happened in the case at bar.

III.

Certiorari Should Not Be Denied on the Basis that the Funds at Issue Are Federal Funds.

Respondents make a brief reference to the fact that the funds at issue, Title XX funds, are federal funds and claim that obviates the need for any Eleventh Amendment analysis. Petitioners did note in their Writ that there is a split among the circuits on the issue of whether federal funds or a mixture of state and federal funds merit Eleventh Amendment protection. (Petition at 12 n.6, *citing Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. denied sub nom, Paschal v. Didrickson*, 112 S Ct. 992 (1992) (White, J., dissenting).) However, it is petitioners' position that this Court should not deny certiorari on the ground that Title XX funds are federal, not state, monies.

Respondents have never raised this issue previously. Both the trial court and the appellate courts assumed, consistent with *Esparza v. Valdez*, 862 F.2d 788 (10th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989), that Title XX funds are state funds for purposes of the Eleventh Amendment and attempted to fashion relief which was consistent therewith. Petitioners agree with the lower courts that the Eleventh Amendment applies to Title XX funds and do not forward this as a basis upon which to grant certiorari. Petitioners submit that it would be inappropriate to deny certiorari on an issue which was not raised previously, for which the factual record was not developed, and which has not been fully addressed by the lower courts.

CONCLUSION

In sum, petitioners seek a review of the trial court's decision on the basis that it violates the Eleventh Amendment to the United States Constitution. Their position is not frivolous, as suggested by respondents. Nor, should they be forced to return first to the trial court prior to seeking relief from this Court. For the foregoing reasons, the petition for certiorari should be granted. In the alternative, petitioners respectfully request the Court to vacate that portion of the court of appeals' opinion affirming the award of $446,277 per year and remand for further consideration.

Respectfully submitted,

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